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7 **BEFORE THE INSURANCE COMMISSIONER**
8 **OF THE STATE OF WASHINGTON**

9 In the Matter of the Application
10 regarding the Conversion and
11 Acquisition of Control of Premera Blue
Cross and its Affiliates

NO. G 02-45

TENTH ORDER: ORDER TO
PRODUCE DOCUMENTS FOR *IN*
CAMERA REVIEW

12 On July 22, 2003, I held a hearing at the Office of the Insurance Commissioner
13 (“OIC”) to address the issue of the production for *in camera* review of certain documents that
14 Premera claims are privileged under the attorney-client and work product doctrines (“privilege
15 claims”).¹ The documents that have been withheld are listed on privilege logs. (“privilege log
16 documents”). The OIC Staff and its experts have requested access to privilege log documents
17 in order to complete their review of Premera’s proposed transaction. Premera has asserted the
18 privilege claims and represented that the factual information in the privilege log documents
19 has been made available in other documents that have been produced.
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23 ¹ Premera submitted proposed language for this Order at the hearing. I gave the OIC
24 Staff and the Interveners until close of business on July 23, 2003, to submit their comments to
25 Premera’s language and to provide alternative language, which they did. Premera submitted a
26 reply on July 24, 2003. I have considered all of the parties’ submissions.

1 On July 7, 2003, the Special Master, Judge George Finkle, issued a Scheduling
2 Recommendation providing for *in camera* review of the disputed documents.² The Special
3 Master found that it was not possible to determine from the descriptions in the privilege logs
4 whether, in fact, the documents are privileged. While I am required to consider privileges that
5 are recognized in law, *see* RCW 34.05.452(1), it is essential to test Premera's claims of
6 privilege to ensure that all documents requested by the OIC Staff and its experts that can be
7 made available under the law are provided. This Order recites the procedures for the *in*
8 *camera* review and affords protection for those documents that are finally determined to be
9 privileged or protected under the law.

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11 **IT IS THEREFORE ORDERED:**

12 1. This Order is entered as part of an adjudicative proceeding in which Judge Finkle is
13 functioning in a quasi-judicial capacity. Judge Finkle's performance of the tasks set forth
14 herein is in furtherance of the Commissioner's obligation as presiding officer to "exclude
15 evidence . . . on the basis of evidentiary privilege recognized in the courts of this state." RCW
16 34.05.452(1).

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18 2. The Commissioner ORDERS Premera, subject to the terms and under the conditions
19 set forth herein, to produce to the Special Master, Judge George Finkle, no later than July 28,
20 2003, all the documents identified on the privilege logs requested by the OIC Staff or its
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22 _____
23 ² Premera asked for an extension to file a request for me to review the Special Master's
24 Scheduling Recommendation pursuant to the *Seventh Order: Appointment of Special Master*.
25 An extension was granted until July 23, 2003. Hoping to resolve its concerns regarding the
26 Special Master's recommendation without resorting to a request for a formal review, Premera
asked for the opportunity to present its position to me and the parties on July 22, 2003. I
granted that request, without prejudice to Premera's right to request formal review, and have
extended the right to request formal review until close of business on July 28, 2003.

1 consultants. Such *in camera* submissions may include, in addition to the documents
2 themselves, declarations or other materials providing context for the privilege log documents.
3 Premera may, but need not, serve on the parties and file with the Special Master briefing
4 related to its privilege claims by the same date. (Such briefing need not discuss the specific
5 contents of individual privilege log documents.) Within one week after such *in camera*
6 production, responsive briefing, if any, may be served and filed by the OIC Staff. Within one
7 week after such responsive briefing, reply briefing, if any, may be served and filed by Premera.
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9 3. Judge Finkle will review the privilege log documents *in camera* for the purpose of
10 determining the propriety of Premera's designations of privilege and work product protection.
11 As stated in his July 7, 2003 Scheduling Recommendation, Judge Finkle will consider
12 "whether certain privilege log documents fundamentally concern business issues, as opposed to
13 being privileged communications relating to legal advice," in addition to any other legally or
14 factually relevant considerations. Following *in camera* review, Judge Finkle will issue a
15 decision as to which, if any, privilege log documents or portions of documents are neither
16 privileged nor protected under the work product doctrine. Judge Finkle's decision will also
17 include which documents or portions of documents, if any, are privileged or protected. The
18 documents or portions of documents referred to in the decision will be specifically identified,
19 for example by Bates number or range. Judge Finkle's decision will be in writing and include
20 the rationale for his decision.
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23 4. Premera shall have three business days following receipt of Judge Finkle's decision
24 (a) to deliver to the OIC Staff those privilege log documents identified by Judge Finkle as
25 discloseable, and/or (b) to identify any individual privilege log documents as to which
26 Premera disputes Judge Finkle's *in camera* determination. Judge Finkle will determine

1 whether the nature or the number of withheld documents justify extending the case schedule.
2 The Special Master recommended a case schedule on July 14, 2003.

3 5. It is understood by all parties to this proceeding that Premera maintains its claims of
4 privilege or work product protection as to the documents to be reviewed by Judge Finkle. The
5 production or disclosure of privilege log documents by Premera to Judge Finkle pursuant to
6 this Order is a compelled disclosure and shall not be deemed a waiver of any privilege or work
7 product protection to which Premera would have been entitled, had the privilege log
8 documents not been disclosed to Judge Finkle. No access will be granted to the privilege log
9 documents based upon Premera's having disclosed them to Judge Finkle for purposes of his *in*
10 *camera* review.
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12 6. Judge Finkle will use the privilege log documents, the information that they contain,
13 and any other *in camera* submissions by Premera solely for the purpose of resolving disputes
14 about the propriety of Premera's privilege and work product claims. All materials and
15 information submitted *in camera* to Judge Finkle will be maintained in confidence and will not
16 be disclosed to any other person. When the question of which, if any, documents or portions of
17 documents must be disclosed is finally resolved, the privilege log documents and all *in camera*
18 submissions related thereto will be returned to Premera by Judge Finkle. To the extent that
19 Judge Finkle makes any notes in the course of reviewing privilege log documents, such notes
20 will be kept confidential and will not be disclosed to any other person.
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22 7. Judge Finkle shall not be examined or questioned as to the substance of any
23 information that he reviews *in camera*. No party or counsel may call Judge Finkle as a witness
24 in any proceeding related in any way to the subject matter of the documents that he reviews
25 under the terms of this Order.
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8. Notwithstanding any other provision of this Order, in accordance with the *Seventh Order: Appointment of Special Master*, Judge Finkle may consult with the Commissioner and the Commissioner's advisors (Carol Sureau, OIC Deputy for Legal Affairs; Scott Jarvis, Deputy for Consumer Protection; Christina Beusch, Assistant Attorney General) and, as necessary, discuss the content of the information that he has reviewed *in camera*. In addition, if any party seeks review by the Commissioner of Judge Finkle's decision regarding the privilege log documents pursuant to the *Seventh Order: Appointment of Special Master*, the Commissioner and his advisors may review information that has been submitted *in camera* as necessary for the Commissioner to render a decision. The Commissioner and his advisors are subject to the same requirements, limitations, and protections as Judge Finkle set forth in this Order regarding preserving the confidentiality of information that has been submitted for *in camera* review. Disclosure to the Commissioner or legal advisors is not a waiver of any privilege or work product protection as more fully explained in paragraph 5 of this Order.

DATED this _____ day of July, 2003.

MIKE KREIDLER, Insurance Commissioner
for the State of Washington